No. 12,509

IN THE

United States Court of Appeals

For the Ninth Circuit

THOMAS E. HAYES, et al., on Behalf of Himself and All Others Similarly Situated,

Appellants,

vs.

UNION PACIFIC RAILROAD CO. (a corporation) and DINING CAR EMPLOYEES UNION LOCAL 372 (a voluntary unincorporated labor organization); and JAMES G. BARKDOLL, as District Director of said Local 372 in the District of Los Angeles, State of California,

Appellees.

Brief for Respondent Dining Car Employees Union Local 372

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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STATEMENT OF THE CASE

For convenience, and because appellant Hayes was in fact the only party plaintiff below,[1] we refer to him in this brief as the "appellant".

1. See pages 15-16, *infra.*

After appellant's original complaint had been twice amended and a supplemental complaint had been filed, the trial court filed a written opinion and order granting respondents' motions to dismiss the complaint upon the ground that it did not state a claim for relief under the Railway Labor Act and hence did not state a claim within the court's jurisdiction (R. 136). Appellant then moved for leave to file an amended complaint (R. 144). The motion was denied (R. 163), and judgment was entered for the respondents (R. 164). The appeal thus presents two questions:

(1) Whether the trial court erred in granting the motions to dismiss the complaint;

(2) Whether the trial court abused its discretion in denying leave to file the proposed amended complaint.

We mention the foregoing at the outset because, while appellant's statement of the points on which he relies clearly recognizes the existence of the two separate questions (R. 178), his brief does not always do so, but on the contrary tends to confuse them.

We turn to the facts pertinent to the two questions.

A. The Order Granting the Motions to Dismiss.

The complaint alleged that there had been in effect since June 1, 1942, a collective bargaining contract between the Railroad and the Union providing for certain seniority groups and classes (R. 5), and that the Railroad had discriminated against plaintiff and other Negroes because of their race by denying them seniority in the higher groups

and classes (R. 5-8). More particularly, the complaint alleged that whereas the Railroad assigned newly employed white men to Group A, it assigned newly employed Negroes to Group B (R. 5-6), and that whereas it assigned newly employed white men to Classes 1 and 2, it assigned newly employed Negroes to Class 3 (R. 6); that bids by Negro employees for bulletined positions in Group A, and in Classes 1 and 2, to which they were entitled by reason of seniority, were rejected by the Railroad in favor of the bids of white men having less seniority (R. 7); and that the Railroad employed Negroes in positions in Group A and in Classes 1 and 2 without, however, assigning them seniority dates therein (R. 7-8). The only charge against the Union was that these alleged discriminatory acts of the Railroad were done with the Union's "connivance" (R. 5, 6, 7, 8).

It should be noted that the complaint asserted no claim that the collective bargaining contract discriminated in any way against Negroes. On the contrary, it apparently was the theory of the complaint that Negro employees had in practice been denied rights to which the contract entitled them or had been discriminated against in respect to matters not covered by the contract.

As revealed by its opinion (R. 136 et seq.), the trial court granted the motions to dismiss because there was no claim that the Union had made a discriminatory contract and that the Railroad was accepting the benefits of such a contract, as was the case in *Steele v. L. & N. R. Co.*, 323 U.S. 192, *Tunstall v. Brotherhood*, 323 U.S. 210, and *Graham v. Brotherhood of Locomotive Firemen and Engineers*, 338 U.S. 232, being the cases upon which appellant relied. The

charge against the Railroad was, not that it was accepting the benefits of a discriminatory contract, but that it was engaging in discriminatory practices without reference to the provisions of the contract. The charge against the Union was not that it had contracted away the rights of Negroes, but that, having made a non-discriminatory contract, it thereafter failed to take action to remedy discriminatory practices engaged in by the Railroad in the face of the contract.

In the latter connection, the court pointed out that "connivance" means simply "corrupt or guilty assent to wrongdoing, not involving actual participation in it, but knowledge of, and failure to prevent or oppose it" or "failure to prevent, or helping by not hindering when it is one's duty to prevent" (R. 142). As we shall show in the argument to follow, the Railway Labor Act imposed no duty upon the Union to take action in the circumstances alleged in the complaint; on the contrary, it did not even confer authority to act.

B. The Denial of Leave to Amend.

The Factual Background Against Which the Motion for Leave to Amend Was Made

When appellant, after the motions to dismiss were granted, moved for leave to file an amended complaint, his original complaint had already been twice amended (R. 140), without correcting the deficiencies above noted.

Furthermore, facts developed by affidavits which were on file showed the allegations of his proposed amended complaint to be pure sham. One of these affidavits had been filed by the Railroad in support of objections to interrogatories which had been addressed to it by appellant (R. 17).

The others had been filed by both respondents (R. 25, 43, 80, 110, 111) and appellant (R. 60, 102) in connection with the motions to dismiss. While the court, in its opinion granting the motions to dismiss, did not refer to the affidavits except for certain background facts,[2] the affidavits were before it when appellant moved for leave to amend and the facts shown thereby were properly considered by the court in the exercise of its discretion as to whether leave to amend should be granted.[3] The facts thus shown by the record were as follows:

First, the record showed that the Union admits Negroes to membership on exactly the same terms and conditions as white men, that it has a substantial Negro membership, that it numbers Negroes among its officers, and that two Negro officers participated in the negotiation and execution of the contract. These facts were set forth in the affidavit of Stephen R. Auguston, the Union General Chairman (R. 25), which affidavit showed that the Union had approximately 140 Negro members employed upon the Railroad's dining cars (R. 26), that two of the Union's four District Chairmen were Negroes (R. 26) and that these two Negroes were among the officers of the Union who negotiated and executed on its behalf the collective bargaining contract referred to in the complaint (R. 26-27). These facts were not contradicted. The only reference to them by appellant was in an affidavit in which he stated (R. 69):

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2. The court drew upon the affidavits for detail not supplied by the complaint itself as to the contractual provisions governing seniority (R. 137-138).

3. Thus, in its judgment of dismissal rendered upon denial of leave to amend, the court recited consideration of the affidavits (see pages 14-15, *infra*).

"It is true that defendant Local 372 does admit Negroes to membership and ostensibly upon the same terms and conditions as white persons, but it is not true and the maker of the affidavit knew it was not true that the Negroes have been accorded exactly the same rights and privileges as white men without any differentiation of any kind or nature between the two.

"Defendant Local 372 is the collective bargaining agent of all its members and is required by law to represent all without discrimination. Yet ever since the collective bargaining agreement of 1942 was executed, the officers of defendant Local 372, notably including the affiant Stephen R. Auguston, have with full knowledge of the facts, failed to take any remedial action on behalf of the Negro members of the Local against the discriminatory practices of defendant railroad against its Negro employes in the Dining Car Department."

Second, the affidavits confirmed that the collective bargaining contract does not discriminate against Negroes, but on the contrary guarantees Negroes exactly the same rights as white men without differentiation of any kind. The relevant provisions of the contract were set forth in an affidavit by H. I. Norris, assistant manager of the Railroad's dining car department (R. 43), and were not disputed. The contract classifies the Railroad's dining cars in four Groups (AA, A, B and C; R. 44) according to the type of service offered (R. 47), and provides for five job Classes (chef-caterers,[4] chefs, second cooks, third cooks and fourth cooks; R. 44). It provides for a ninety day probationary period for new employees, and for assignment of a sen-

4. Chef-caterers are employed only on Group AA trains (R. 46).

iority date in the Class and Group in which the probationary period is completed and in all corresponding and lower Classes in the same and lower Groups (R. 52). It further provides that vacancies shall be bulletined for bidding and shall be assigned on the basis of seniority, provided that the bidder has the requisite fitness and ability (R. 50-51). It is apparent from a reading of these provisions that they do not discriminate in any way against Negroes, and this fact was conceded by appellant. Thus he stated in one of his affidavits (R. 69-70):

> "On page 3, line 15, of the Auguston affidavit, the following statement appears:
>
> " 'Said agreement secures to Negroes exactly the same rights and privileges as white men and does not differentiate in any way between the two.'
>
> "This statement is verbally true, but it ignores the real issue, which is discrimination against Negroes at the time they are hired by the defendant railroad."

Third, the affidavits confirmed that, even assuming the Railroad to have engaged in the discriminatory practices alleged, the Union was guilty only of failure to take remedial action. The Auguston affidavit showed in substance that the Union did not discriminate against Negroes in any way (R. 26) and that the Union did not have any part in any discriminatory practices in which the Railroad may have engaged (R. 28-29). Appellant's only reply to this showing was his statement above quoted that the Union's officers "have with full knowledge of the facts, failed to take any remedial action on behalf of the Negro members of the Local against the discriminatory practices of defendant railroad" (R. 69).

Fourth, the affidavits showed that the Railroad had in fact not engaged in the discriminatory practices alleged. More particularly:

(a) Appellant was forced to concede that his allegation that the Railroad rejected Negro bids for positions in Groups A and AA and Classes 1 and 2, and thus denied Negroes seniority in such groups and classes, was false (R. 77). This concession was wrung from him by the fact, as shown by the Auguston affidavit, that appellant himself held seniority in Group A with a seniority date of July 7, 1948 (R. 28), and that of the 71 Negroes listed in the appendix to the complaint whom Auguston had been able to identify, 61 held seniority in Groups A or AA, and 15 held seniority in Class 2 (R. 28-32). Appellant, as he notes in his brief (p. 10), therefore abandoned the allegations above mentioned and omitted them from his proposed amended complaint. After the filing of the Auguston affidavit, appellant based his case entirely upon the alleged discrimination in the initial assignment of newly employed Negroes (R. 61-62, 71-72, 75, 77-78, 109, 170-172).

(b) In respect to the sole remaining claim, namely, that of discrimination in the initial assignment of new employees, the affidavits again showed that there was in fact no such discrimination. In this connection, two affidavits (R. 80, 111) by H. A. Hansen, manager of the Railroad's dining car department, supplied detailed information as to the initial assignment of all employees, white and colored, who had worked for the railroad in the cooks' craft at any time during the four years preceding the commencement of the action. The facts shown by these affidavits were challenged by appellant only in the respect and to the extent hereinafter noted. We turn to a consideration of these facts.

The first of the two Hansen affidavits stated that a total of 946 persons, white and Negro, had worked for the Railroad in the cooks' craft during the four years preceding the commencement of the action and then set forth a schedule showing the initial seniority assignments of these 946 persons when first employed (Tr. 82). The schedule is here reproduced for the Court's convenience:

White			Negro		
Group	Class	No.	Group	Class	No.
AA	3 (Second Cooks)	2	AA	5 (Fourth Cooks)	10
AA	4 (Third Cooks)	9	A	2 (Chefs)	2
AA	5 (Fourth Cooks)	56	A	3 (Second Cooks)	13
A	2 (Chefs)	7	A	4 (Third Cooks)	39
A	3 (Second Cooks)	46	A	5 (Fourth Cooks)	254
A	4 (Third Cooks)	36	B	2 (Chefs)	4
A	5 (Fourth Cooks)	189	B	3 (Second Cooks)	27
B	4 (Third Cooks)	3	B	4 (Third Cooks)	64
B	5 (Fourth Cooks)	15	B	5 (Fourth Cooks)	165
		363	C	2 (Chefs)	1
			C	4 (Third Cooks)	4
					583

Preliminarily, it may be noted that of 283 employees assigned initially to Group B trains, 265 were Negroes. These figures indicate simply that in staffing its Group B trains (mostly the so-called Challengers) the Railroad hired Negroes almost exclusively. Any discrimination involved in this practice was discrimination, not against Negroes, but in their favor and against white applicants. The pertinent question is, not whether the Railroad discriminated in favor of Negroes in staffing Group B trains, but whether it discriminated against them in staffing Group A and AA trains.

Along the same line, it should be noted that all of the 18 white men who were assigned initially to Group B were assigned to the two lowest Classes, 4 and 5. Only Negroes were assigned initially to the higher classes. Appellant himself was initially assigned to Class 3[5] (second cook) and so admitted (R. 67). Indeed, appellant made no attempt to contradict any of the above figures relative to the Classes to which new employees in Group B were assigned. Those figures plainly cannot be reconciled with appellant's claim that white men were assigned to the higher Classes and Negroes discriminatorily confined to the lower.

Turning now to trains in Groups A and AA, a total of 663 employees were assigned initially to these groups and were accorded seniority therein. Of this total, 318, or approximately one-half, were Negroes. Appellant countered only with the assertion, the materiality of which is not apparent,[6] that no Negroes, with one exception, had

5. At this point it should be noted that whereas the original complaint alleged that newly employed white men were assigned to Classes 1 and 2 and that Negroes were confined to Class 3 and lower, the proposed amended complaint alleged that newly employed white men were assigned to Classes 1, 2 and 3, and that Negroes were confined to Class 4 and lower (see page 13, *infra*). Since we are considering the initial employment data with reference to the allegations of the proposed amended complaint, our breakdown of the data in this and subsequent portions of our brief is between Classes 1, 2 and 3, on the one hand, and Classes 4 and 5 on the other.

6. We say that the materiality of the assertion is not apparent because if it were true that the initial employment and assignment to Groups A and AA of all of the 318 Negroes in question took place more than four years prior to commencement of the action, that fact would be entirely inconsistent with the allegation of the proposed amended complaint that prior to, at the time of, and subsequent to execution of the contract of June 1, 1942, it was the Railroad's practice to assign all newly employed Negroes to Group B (see page 13, *infra*).

been initially assigned to Groups A or AA within four years preceding the commencement of the action (R. 103, 104). This assertion plainly was not "made on personal knowledge"[7] and was in fact false, for a further affidavit by Hansen listed all of the 318 Negroes above-mentioned and the respective dates of their initial employment and showed that 247 were hired within four years preceding the commencement of the action (R. 114, 117, 118-119, 120, 129-135), including 10 of the Negroes listed in the appendix to the complaint (R. 123).[8] Appellant attempted no reply to this showing.

As for the job classes to which employees initially hired in Groups A and AA were initially assigned, the showing was not as strong but nevertheless was entirely inconsistent with appellant's claim that Negroes were denied assignment to the higher classes. Of the total of 663 employees, white and Negro, initially employed in Groups A or AA, 70 were initially employed in Classes 1, 2 and 3[9] and were

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7. See Rule 56(e), Rules of Civil Procedure, providing with respect to motions for summary judgment that "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." We know of no reason why assertions made without personal knowledge should be given weight in reviewing exercise by a trial court of its discretionary power to deny leave to amend.

8. It is in face of the above fact that appellant asserts with emphasis at page 25 of his brief that "the fact remains undisputed that every one of the appellant Negro cooks, when first employed by Railroad in its dining car service as a cook, was arbitrarily given a seniority date in Group B."

9. See note 5, page 10, *supra*. At page 25 of his brief appellant apparently forgets that his proposed amended complaint alleged that newly employed Negroes were confined to Classes 4 and 5 and states with emphasis that they were assigned to "Classes 3 or 4."

accorded seniority therein. Among those 70 were 15 Negroes.

Appellant's affidavits were, of course, replete with vituperative general assertions that the Railroad had discriminated against Negroes at the time of initial employment. But those general assertions, made without personal knowledge of the facts and without any showing of competency to testify thereto, furnish no basis for disturbing the discretionary action of the trial court.[10] Appellant did not produce the affidavits of any of the 87 Negroes listed in the appendix to his complaint, to whom he referred as fellow "plaintiffs," and who presumably would have been competent to testify as to the facts of their own employment. As for appellant's employment, he was forced to admit that he was initially employed and assigned seniority in Class 3 (R. 67), and it was in the face of this admission that he sought to allege in his amended complaint that Negroes, when initially employed, were confined to Classes 4 and 5 (R. 151, 154, 156).

The Proposed Amended Complaint

It was against the foregoing background that appellant moved for leave to amend. We turn now to the allegations of the proposed amended complaint.

Unlike the original complaint, the proposed amended complaint contained two counts. The first count was the same as the original complaint except that it dropped the allegations regarding rejection of bids (see appellant's brief, p. 10) and that whereas the original complaint had alleged that newly employed white men were initially as-

10. See note 7, page 11, *supra*.

signed to Classes 1 and 2 and newly employed Negroes were confined to Class 3, or lower (R. 6), the amended complaint alleged that newly employed white men were initially assigned to Classes 1, 2 and 3 and that newly employed Negroes were confined to Classes 4 and 5 (R. 151, 154, 156). Appellant proposed to make this allegation in the face of the admitted fact that he himself had been initially assigned to Class 3 (R. 67).

It was upon the second count that appellant relied to correct the deficiencies of the original complaint. This count was the same as the first except that it alleged in substance that prior to execution of the contract of June 1, 1942, it was the practice to discriminate against Negroes by "arbitrarily assigning to Negroes, when first employed by Railroad, seniority dates in Group B * * * and in Classes 4 and 5" (R. 154), that the contract of June 1, 1942, "did not provide any standard or yardstick by which it could be determined in which of the several seniority groups and classes new employees should be given seniority dates" (R. 155)[11] and that the Railroad and the Union entered into a contemporaneous "verbal agreement" for continuance of the existing practice, thereby "modifying" the written contract (R. 155).

The following should be noted:

First, the allegation that the written contract did not contain any standard for determining the seniority group and class of new employees was false. Rule 17(b) of the contract provides in plain terms that a new employee, on the completion of the first ninety days of continuous service,

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11. At page 23 of his brief, appellant erroneously states that this allegation also was contained in his original complaint.

is to be accorded a seniority date "in the seniority class and group in which such ninety days of continuous service is completed, in all lower classes in that group, and in all corresponding and lower classes in all lower groups" (R. 52).

Second, the allegation that the Union entered into a "verbal agreement" with the Railroad was contrary to the implicit concession theretofore made that the Union had been guilty only of a failure "to take any remedial action on behalf of the Negro members of the Local against the discriminatory practices of the railroad" (see page 7, *supra*). Although appellant had shown no reluctance to make sweeping and irresponsible assertions in his affidavits, he nevertheless had not even suggested the existence of a verbal agreement such as he sought to allege in his amended complaint. Furthermore, the allegation of a "verbal agreement" by which the written contract was "modified" was contrary to the allegation of both the original and proposed amended complaints that "At all times herein mentioned" the written contract "was and now is in full force and effect" (R. 5, 150).

Third, the allegation of a continuation of the alleged discriminatory practice was contrary to the showing theretofore made, as hereinabove set forth, that there has in fact been no such discrimination (see pages 8-12, *supra*) and, in so far as plaintiff himself was concerned, was contrary to his own admission theretofore made that he had been initially assigned to Class 3 (see page 10, *supra*).

C. The Judgment.

After denying appellant's motion for leave to amend, the court signed a formal judgment of dismissal which recited that the court, after considering the complaint, the amend-

ments thereto, the affidavits filed by the parties, and the statements of counsel, had concluded that there was no genuine issue as to any material fact (R. 164-175). Appellant's brief remarks (p. 9) that while the order granting the motion to dismiss was based solely on lack of jurisdiction, "the judgment of dismissal purports not only to rule on the question of lack of jurisdiction, but also upon other matters presented by the defendants." We assume that appellant refers to the fact that the judgment referred to the motions to dismiss as having been granted because of failure to state a claim as well as lack of jurisdiction. The fact is, of course, that the trial court's decision that it lacked jurisdiction was based on a holding that the complaint failed to state a claim under the Railway Labor Act. The reference in the judgment to the complaint, the amendments thereto, the affidavits filed by the parties and the statements of counsel, reveals that the court considered these matters (and properly so, as we shall see) in passing on the motion for leave to amend.

D. The Parties.

Before proceeding with the argument, there remains to be straightened out the matter of parties. The original complaint alleged that appellant Hayes brought the action on his own behalf and on behalf of others similarly situated, including 97 persons listed in the appendix. The complaint thus was phrased as one in a so-called spurious class action under Rule 23a of the Rules of Civil Procedure (see Moore's Federal Practice (2d ed.) pp. 3442 et seq.). While appellant referred to the persons listed in the appendix as "plaintiffs" they in fact were not parties plaintiff and could be-

come such only by appropriate motion to intervene as provided by Rule 24 (Moore's Federal Practice (2d ed.) pp. 3473 et seq.).

In the proposed amended complaint, appellant Hayes purported to join with himself as parties plaintiff a large number of other persons, including most of those listed in the appendix to the original complaint, none of whom had applied for or obtained leave to intervene. If the motion for leave to file the amended complaint were itself to be regarded as a motion for leave to intervene, the question whether such leave should be granted was addressed to the trial court's discretion (Rule 24(b)). Such leave was, of course, properly denied if appellant Hayes' own case was properly subject to a judgment of dismissal.

We mention the foregoing because the notice of appeal states that the appeal is by all of the persons named as parties plaintiff in the proposed amended complaint (R. 166-167) and the opening brief speaks of "Appellants". However, neither the statement of the points on which reliance is placed (R. 178), nor the opening brief raise any question regarding denial of leave to intervene, and we therefore assume that further comment upon the question is unnecessary.

Summary of Argument

As stated at the outset, the instant appeal presents two questions: (1) Whether the trial court erred in granting the motions to dismiss; and (2) whether the trial court abused its discretion in denying leave to file the proposed amended complaint. Our argument upon these two questions may be summarized briefly as follows:

1. The motions to dismiss the original complaint were properly granted because the complaint asserted no claim that the Union and the Railroad had entered into a discriminatory contract, but asserted only that the Union had failed to take action to remedy the alleged grievances of appellant and other Negroes against the Railroad. Appellant was competent to avail himself of legal remedies for any wrongs committeed against him by the Railroad, and the Railway Labor Act neither conferred authority nor imposed a duty upon the Union to take action in his behalf.

2. The trial court did not abuse its discretion in denying leave to file the proposed amended complaint because appellant had already amended his complaint twice and because the record showed that the allegations of the proposed amended complaint were made without regard for the truth and were sham.

ARGUMENT

I. The Motions to Dismiss Were Properly Granted.

As heretofore noted, the only charge made against the Union by the original complaint was that the alleged discriminatory practices of the Railroad were carried on with the Union's "connivance". The word "connivance" means "intentional failure or forbearance to discover a wrongdoing; voluntary oversight; passive consent or co-operation" and in law "corrupt or guilty asset to wrongdoing, not involving actual participation in it, but knowledge of, and failure to prevent or oppose it". Webster's International Dictionary. See also Bouvier's Law Dictionary and *Brandon v. Holman,* 41 F.2d 586, 588, both quoted by the trial court. In the words of appellant himself, his complaint

was that the Union "with full knowledge of the facts, failed to take any remedial action on behalf of the Negro members of the Local against the discriminatory practices of defendant railroad". See page 7, *supra*. The question thus presented is whether the Railway Labor Act imposed a duty upon the Union to take such action. For reasons about to be stated, we submit that it did not.

In *Elgin, J. & E. R. Co. v. Burley*, 325 U.S. 711, the Supreme Court pointed out that the Railway Labor Act contemplates two types of disputes, namely, "disputes over grievances and disputes concerning the making of collective agreements" (325 U.S. at 722). It then held that while the Act vests the statutory collective bargaining agent with "exclusive authority to negotiate and to conclude agreements" (325 U.S. at 778), it does not vest the agent with such authority in respect to grievances, and that in order for a railroad union to conclude its members by a settlement of their grievances "authorization by them over and above any authority given by the statute was essential" (325 U.S. at 741). In short, the Court held that the Act does not itself confer authority upon the collective bargaining representative to act for its members in respect to grievances or wrongs suffered by them, but that such authority must be conferred by the affected members. We need add only that if the Act confers no authority to act, then it obviously imposes no duty to act.

The applicability of the foregoing to the case alleged by the original complaint herein is apparent. When the Union negotiated and executed the collective bargaining contract of June 1, 1942, it was acting in the field of its exclusive statutory authority and was under a statutory duty to

refrain from arbitrary exercise of that authority in a manner inimical to the interests of Negro employees. The original complaint asserted no claim of any breach of that duty. Appellant did not (and obviously could not) claim that the provisions of the written contract were discriminatory, and the claim of a contemporaneous verbal agreement was not asserted until the proposed amended complaint was offered.

If, after execution of the contract of June 1, 1942, the Railroad committed any wrong against appellant or any other Negro, then the individual wronged had his remedy against the Railroad either in proceedings under the Railway Labor Act or in the courts, and was perfectly competent to act for himself.[12] The Railway Labor Act does not deprive an employee of power to act for himself in respect to such matters; it is only in the field of negotiation and execution of collective contracts that the individual cannot act for himself but must rely upon the union in which exclusive authority is vested. In the field of grievances, the Union can act for the individual only pursuant to the individual's authorization. The Act itself confers no authority to act and, by the same token, imposes no duty to act.

The case of *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, and the other cases upon which appellant

12. We know of no legal or equitable remedies available to the Union which were not available to appellant. On the contrary, appellant, being the person allegedly wronged, would be the person to whom the law normally would look to institute proceedings. As for remedies other than legal remedies, the only course open to the Union would be to threaten or call a strike. We doubt its right to do so in view of the existing contract. In any event, we do not understand that there is any contention that the Railway Labor Act imposed upon the Union a legal duty to threaten or call a strike.

relies, are in complete accord with what we have said. In the *Steele* case the union there involved had taken affirmative action against Negroes whose interests it was supposed to represent by executing a discriminatory contract which deprived them of seniority rights and excluded them from employment. This action by the union was taken in the field of its exclusive statutory power and authority in which individuals were deprived of the right to act for themselves, a fact which the court emphasized in these words:

> "Section 2, Second, requiring carriers to bargain with the representatives so chosen, operates to exclude any other from representing a craft. *Virginian Railway Co. v. System Federation,* supra, 545. The minority members of a craft are thus deprived by the statute of the right, which they would otherwise possess, to choose a representative of their own, and its members cannot bargain individually on behalf of themselves as to matters which are properly the subject of collective bargaining" (323 U.S. at 200).

The Court was of the opinion (323 U.S. at 202) that this exclusive statutory power and authority implied some commensurate statutory duty. But even in this field of exclusive authority, the Court did not go so far as to hold that the union was under a statutory duty to take affirmative action to protect minority interests; it held only that the union was under a duty to refrain from affirmative action destructive of minority interests:

> "Unless the labor union representing a craft owes some duty to represent non-union members of the craft, at least to the extent of not discriminating against them as such in the contracts which it makes

as their representative, the minority would be left with no means of protecting their interests or, indeed, their right to earn a livelihood by pursuing the occupation in which they are employed" (Emphasis supplied) (323 U.S. at 201).

The cases of *Tunstall v. Brotherhood of Locomotive Firemen and Engineers,* 323 U.S. 210, and *Graham v. Brotherhood of Locomotive Engineers and Firemen,* 338 U.S. 232, involved substantially the same facts and were based upon the same grounds as the *Steele* case. The rationale of these decisions was summarized in the case last cited as follows:

"The *Steele* and *Tunstall* cases, *supra,* arose under circumstances almost indistinguishable from those of the instant case, and the complaints asked the same kind of relief. We held there that, as the exclusive statutory representative of the entire craft under the Railway Labor Act, the Brotherhood could not bargain for the denial of equal employment and promotion opportunities to a part of the craft upon grounds of race. We pointed out that the statute which grants the majority exclusive representation for collective bargaining purposes, strips minorities within the craft of all power of self-protection, for neither as groups nor as individuals can they enter into bargaining with the employers on their own behalf. *Order of Railroad Telegraphers v. Railway Express Agency,* 321 U.S. 342; *J. I. Case Co. v. Labor Board,* 321 U.S. 332; *Medo Photo Supply Corp. v. Labor Board,* 321 U.S. 678. And we held that abuse of its powers by perpetrating discriminatory employment practices based on racial considerations gives rise to a cause of action under federal law which federal courts will entertain and will remedy by injunction" (338 U.S. at 238).

In short, the foregoing cases hold that a railway union, in exercising its exclusive statutory power and authority to negotiate collective bargaining contracts, is under a corresponding statutory duty to refrain from arbitrary action destructive of minority interests. The complaint in the present case asserted no claim of any violation of that duty. All that was claimed was that the Union, having obtained a collective bargaining contract from the Railroad which guaranteed to appellant and other Negroes exactly the same rights as white men, thereafter left it to appellant to enforce those rights, or any other that he might have, with remedies of which he was fully competent to avail himself. We submit that the Union was under no statutory duty to do otherwise, that the complaint therefore did not state a claim under the Railway Labor Act, and that it therefore did not state a claim within the trial court's jurisdiction.

II. The Trial Court Did Not Abuse Its Discretion in Denying Leave to Amend.

A motion for leave to amend is addressed to the discretion of the trial court, and its ruling thereon will not be disturbed upon appeal in the absence of a showing that its discretion was abused. *C. E. Stevens Co. v. Foster & Kleiser Co.* (C.C.A. 9th), 109 F.2d 764, 768-769, reversed on other grounds, 311 U.S. 255. In the present case there is no such showing. On the contrary there were at least two good reasons for the trial court's action: first, appellant had already amended his complaint twice without avail; and second, his proposed amended complaint was sham and represented an attempt to trifle with the court.

A. PLAINTIFF HAVING ALREADY FILED TWO AMENDMENTS AND A SUPPLEMENTAL COMPLAINT, LEAVE TO FURTHER AMEND PROPERLY WAS DENIED.

The motions to dismiss and accompanying affidavits were filed on September 14 and 15, 1949 (R. 37, 42). The last of the counter and reply affidavits was filed on November 15, 1949 (R. 135), and the court rendered its opinion on the motions to dismiss on January 19, 1950 (R. 144). The motions to dismiss thus were the subject of hearing and consideration by the trial court over a period of four months. Prior to rendition of the court's opinion plaintiff had amended his complaint twice and had filed a supplemental complaint, all without correcting the deficiency for which the complaint was dismissed. This Court has held that these facts alone justify denial of leave to amend. *C. E. Stevens Co. v. Foster & Kleiser Co.,* supra.

B. THE PROPOSED AMENDED COMPLAINT WAS SHAM, AND LEAVE TO FILE IT WAS PROPERLY DENIED FOR THAT REASON.

A pleading may be stricken as sham on the basis of affidavits showing its falsity. *Herbert v. Cosby,* 17 N. J. Misc. 204, 7 A.2d 400; *McReavy v. Zeunes,* 215 Minn. 239, 9 N.W. 2d 924. If a pleading may be stricken on that basis, then certainly a motion for leave to file an amended pleading, which motion is addressed to the court's discretion, may be denied on the same basis. Thus, this Court has held that a trial court, in the exercise of its discretion, is not bound to accept a proposed amendment at face value, but may evaluate it in the light of facts shown by the record (indeed, in some circumstances, may look outside the record) and may properly deny leave to amend if the amendment would be false or unavailing. *Suren v. Oceanic S.S. Co.*

(C.C.A. 9th), 85 F.2d 324. Thus, leave to amend is properly denied where the amendment contradicts the original pleading (*Pelelas v. Caterpillar Tractor Co.* (C.C.A. 7th), 113 F.2d 629, cert. den. 311 U.S. 700), or where the court is not satisfied as to the truth of the proposed averments (*Winterbottom v. Casey* (E. D. Mich.), 283 F. 518). And where a plaintiff's original pleading has stated the facts in detail, the court is entitled to asume that the facts have been fully stated, and that no other facts could be truthfully alleged. *C. S. Smith Metropolitan Market Co. v. Food and Grocery Bureau of So. Cal.* (S.D. Cal.), 33 F. Supp. 539, 540; *Boro Hall Corp. v. General Motors Corp.* (S.D. N.Y.), 37 F. Supp. 99, 100, aff'd (C.C.A. 2d), 124 F.2d 822.

In the present case the motion for leave to amend was made against a factual background which, we submit, justified the trial court in concluding that the new allegations sought to be added were sham. As hereinabove noted, those allegations were that the written contract of June 1, 1942, "did not provide any standard or yardstick by which it could be determined in which of the several seniority groups and classes new employees should be given seniority dates" and that the Railroad and the Union entered into a contemporaneous "verbal agreement" under which newly employed Negroes were to be assigned to Group B and Classes 4 and 5, whereas newly employed white men were to be assigned to Group A and Classes 2 and 3 (see page 13, *supra*). In addition to his original complaint, plaintiff had filed two amendments, a supplemental complaint, and two lengthy affidavits, without setting forth the facts sought to be alleged in the foregoing averments or even hinting at their existence. Indeed, the proposed allega-

tions were contrary to the facts theretofore shown and conceded (see pages 13-14, *supra*), and were inconsistent with other allegations of both the original and amended complaints (see page 14, *supra*). Under these circumstances the court was justified in concluding that the pertinent facts had already been fully stated, that additional facts could not be truthfully alleged, and that the proposed new allegations were made without regard for the truth and were sham.

Furthermore, the trial court was justified in concluding that certain essential allegations carried over from the original complaint likewise were sham. We refer to the allegations to the effect that the Railroad, after making the alleged verbal agreement, actually engaged in the discriminatory practice of arbitrarily assigning newly employed Negroes to Group B and Classes 4 and 5. In appellant's own case (and after all it is appellant's case with which we are concerned), he had been assigned initially to Class 3 and had so admitted (see page 10, *supra*). The allegations likewise were shown by the record to be false with respect to Negroes generally (see pages 8-12, *supra*).

We submit that the trial court was justified in concluding from what it had learned in the proceedings upon the motions to dismiss that the allegations of the amended complaint were made without regard for the truth, and that the court, in the exercise of a sound discretion, properly denied leave to file it.

CONCLUSION

We submit that the motions to dismiss were properly granted and that the court did not abuse its discretion in denying leave to further amend. Judgment therefore was properly entered for the respondents. We respectfully submit that the judgment should be affirmed.

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